

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

HYPERKINETICS CORPORATION :  
 :  
 v. : CIVIL NO. 1:03CV33  
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 FLOTEC, INC. :  
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 \_\_\_\_\_ :

RULING ON DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT ON JURISDICTION

(Paper 35)

Background

Plaintiff Hyperkinetics Corporation is a Vermont company which manufactures non-reusable hard plastic seals used in delivering oxygen through a regulator from a pressurized canister. See Complaint (Paper 4) at paras. 1, 3. Defendant Flotec, Inc. is a foreign corporation which manufactures the regulators utilized with pressurized oxygen cylinders. Flotec also manufactures and distributes seals which are made for the same purpose as those manufactured by the plaintiff. See Paper 4 at para. 4.

In this diversity action, the plaintiff alleges Flotec has made statements which suggest it is unsafe to use the hard plastic seals it produces, thereby libeling the plaintiff and causing it to lose business. Flotec first moved to dismiss this action for lack of in personam jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). On March 13, 2003, the Court denied the motion without prejudice to renew after the parties had

conducted limited discovery on the issue of in personam jurisdiction. See Motion to Dismiss (Paper 21).

Having completed that discovery, Flotec has filed this Motion for Summary Judgment on Jurisdiction (Paper 35). Incorporating arguments from its Motion to Dismiss, Flotec maintains its contacts with Vermont are too insubstantial to support general jurisdiction.

On a motion for summary judgment, the moving party has the initial burden of informing the Court of the basis for its motion and of identifying the absence of a genuine issue of material fact. See, e.g., Chambers v. TRM Copy Centers, Corp., 43 F.3d 29, 36 (2d Cir. 1994). Where, as here, a motion for summary judgment is supported by affidavits or other documentary evidence, the party opposing that motion must set forth specific facts showing there is a genuine, material issue in dispute. See Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994). Only disputes over facts which might affect the outcome of the suit under the governing law preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Paragraph 6 of the Complaint contains the only allegation that the defendant is amenable to this Court's jurisdiction. In that paragraph, the plaintiff alleges:

At all times material hereto Flotec sold and distributed regulators and seals and related products to customers in Vermont and actively marketed its products in Vermont to existing and potential Vermont customers and employed a sales representative for Vermont who regularly visited Vermont businesses and customers to promote and accomplish the sale and distribution of Flotec products to said Vermont customers.

In response, Flotec asserts: "The only additional contacts provided by the Plaintiff [after discovery] have to do with incidental contacts which have nothing to do with the subject matter of the dispute and therefore do not assist in creating general jurisdiction over the Defendant." Paper 35 at 1.

The parties' Local Rule 7.1(c) statements indicate the following. See Flotec's Statement of Undisputed Material Facts (Paper 36); Plaintiff's Statement of Disputed Material Facts (Paper 39). Flotec is an Indiana corporation with its principal place of business in Indianapolis. It does approximately \$2.5 million in gross annual sales. The company does not have an office or sales representative in Vermont, nor is it registered to do business in Vermont. It does not advertise or actively solicit customers in this state.

New England Medical Services of Ledyard, Connecticut (hereinafter "New England Medical") is Flotec's regional distributor in this area. According to the defendant, "[t]he distributor buys [product] from [Flotec], he pays us and then

he, in turn, sells it to his customers with a mark up."

Deposition of Gilbert Davidson (appended to Paper 38) at 32.

On October 31, 2002, Flotec shipped 20 Dome Handles and 50 post valve seals to Fletcher Allen Health Care in Burlington pursuant to a request made by New England Medical. On March 31, 2003, Flotec shipped 50 Yoke Washers to Fletcher Allen. See Paper 36 at para. 4.

The defendant represents these sales as de minimus transactions. Flotec's chairman explains: "The total value of Flotec items sold was \$90.00 for the Dome handles (20 \* \$4.50) and \$41.50 for each set of 50 seals (50 \* \$0.83), for a total sales of \$173.00, excluding shipping and handling." Affidavit of Gilbert Davidson (Ex. A to Paper 36) at para. 7. According to an invoice appended to Paper 36 as Ex. B, the Yoke Washers shipped in March 2003 also cost \$41.50. Flotec's chairman further states he is unaware of any other direct sales to businesses in Vermont from 1982 to the present. Id. Because it only has sold \$173.00 worth of product unrelated to the seals at issue in Vermont through an independent sales person, Flotec argues the plaintiff cannot establish the minimum contacts necessary for this Court to assume general in personam jurisdiction.

Hyperkinetics points out that, prior to New England Medical, Flotec had two other distributors of its products for

a geographical area including Vermont. It does not appear, however, that either of these distributors were Vermont-based companies or conducted any substantial business in Vermont. See Affidavit of Thomas Andrews (appended to Paper 38) at para. 8 ("The majority of sales of Flotec products to Merriam-Graves Corporation occurred between the Merriam-Graves Corporation warehouse in Charlestown, New Hampshire and Flotec."); Defendant's Response to Plaintiff's Interrogatories (appended to Paper 39) at para. 1 ("Tiger Medical, located in Amesbury, Massachusetts, was the sole distributor of Flotec products in the New England area from 1995 until mid-2002 . . . ).

For example, plaintiff's affiant from Merriam-Graves Corporation provides equivocal evidence of contacts with Vermont; his affidavit does not identify which transactions involving Flotec products were resales by Merriam-Graves or direct transactions between the defendant and a Vermont buyer. He states:

I am attaching hereto a multi-page list reflecting sales of Flotec products by Merriam-Graves Corporation over the past five years to Vermont customers. (**Attachment 2**). The list includes sales from Flotec to our Charlestown warehouse which were then shipped to Vermont for resale to Vermont customers. The list also includes sales which were arranged directly between one or more of our Vermont branches and Flotec, Inc. In the latter instances, our Vermont branches ordered and purchased products directly from Flotec which shipped the items

directly from Flotec's plant to the Vermont branch which placed the order. Our Vermont branch then resold the products to Vermont customers.

Affidavit of Thomas Andrews at para. 10.

These assertions, however, are unsupported by specific information which would allow the Court to evaluate the nature and extent of the alleged Vermont transactions. In his attachments, Mr. Andrews "redacted sales that were not transacted through our Vermont branches, even where the product was sold to a Vermont customer" and "redacted the pricing information to protect Merriam-Graves proprietary information . . .". Andrews Affidavit at paras. 11, 12.

#### Discussion

The plaintiff has the burden of establishing this Court's jurisdiction over the defendant. See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 566 (2d Cir. 1996). Before discovery, a plaintiff may defeat a motion to dismiss with legally sufficient allegations of jurisdiction. See Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1025 (2d Cir. 1997). "[W]here parties have conducted extensive discovery regarding the defendant's contacts with the forum state, but no evidentiary hearing has been held - the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by

[the ultimate trier of fact], would suffice to establish jurisdiction over the defendant." Metropolitan Life, 84 F.3d at 567 (quotations omitted). Even crediting the plaintiff's allegations of jurisdictional fact as true, Hyperkinetics has failed to establish personal jurisdiction over Flotec.

To assert personal jurisdiction over the defendant, the Court must find: (1) Vermont's long-arm statute reaches the defendant; and (2) the exercise of that statute does not offend due process. See, e.g., Ben and Jerry's Homemade, Inc. v. Coronet Priscilla Ice Cream Corp., 921 F. Supp. 1206, 1209 (D. Vt. 1996). The Vermont Supreme Court has interpreted its long-arm statute, 12 V.S.A. § 913(b), as permitting a court to assert jurisdiction over a defendant "to the outer limits of the due process clause." Sollinger v. Nasco Int'l, Inc., 655 F. Supp. 1385, 1387 (D. Vt. 1987). Because this interpretation of 12 V.S.A. § 913(b) merges the two prongs of jurisdictional analysis, the Court need only consider whether the exercise of jurisdiction over the defendant violates due process. See Ben & Jerry's, 921 F. Supp. at 1209.

The due process clause protects a nonresident defendant from being subject to the binding judgment of a state with which it lacks meaningful minimum contacts. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985). "The due process test for personal jurisdiction has two related components: the 'minimum contacts' inquiry and the

'reasonableness" inquiry." Metropolitan Life, 84 F.3d at 567. "In determining whether minimum contacts exist, the court considers the relationship among the defendant, the forum, and the litigation." Chaiken, 119 F.3d at 1027 (citation and quotations omitted). When examining the defendant's contacts, the Court must be mindful of those "by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state thus invoking the benefits and the protections of its laws." Sollinger, 655 F. Supp. at 1387 (quotations omitted).

The second part of the due process inquiry requires the Court to determine "whether the assertion of personal jurisdiction comports with 'traditional notions of fair play and substantial justice'- that is, whether it is reasonable under the circumstances of a particular case." Metropolitan Life, 84 F.3d at 568 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). As part of the "reasonableness" analysis, the Court may consider: "(1) the burden that the exercise of jurisdiction will impose on the defendant; (2) the interests of the forum state in adjudicating the case; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy; and (5) the shared interest of the states in further substantive social policies."



Metropolitan Life, 84 F.3d at 568. Thus, even if minimum contacts exist, exercising jurisdiction may be unreasonable where the defendant's "general business contacts with Vermont were [not] continuous, systematic and of a sufficiently substantial nature as to permit a Vermont court to entertain a cause of action." Bechard v. Costanzo, 810 F. Supp. 579, 583-84 (D. Vt. 1992).

The plaintiff has shown some of defendant's product has entered Vermont. Assuming, therefore, the plaintiff has shown the existence of "minimum contacts," the Court remains unconvinced that the nature and extent of defendant's activities are sufficiently continuous, systematic and substantial to confer general jurisdiction.

This suit is basically a libel suit; it does not arise from the defendant's sales or other contracts with Vermont consumers. The Court, therefore, must determine whether the record provides a sufficient basis for assuming general jurisdiction over the defendant. See Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984). "Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to demonstrate the defendant's continuous and systematic general business contacts." Metropolitan Life Ins., 84 F.3d at 567 (citation and quotations omitted).

Here, Flotec's sales, made either directly or through independent, non-Vermont representatives, are few in number and do not evidence "continuous and systematic general business contacts." See Helicopteros, 466 U.S. at 416-18. Because it is based in Indiana, the defendant will certainly incur some burden litigating in this state. Furthermore, the plaintiff has identified no unique Vermont policy or interest implicated in resolving this dispute. See Bechard, 810 F. Supp. at 586 (suggesting Vermont's interest "in ensuring recovery for one of its residents" provides an insufficient basis for asserting general jurisdiction). At best, the defendant's contacts with Vermont are indirect, minimal and insubstantial. See Metropolitan Life Ins., 84 F.3d at 573 ("While Robertson's \$4 million dollars in sales in Vermont between 1987 and 1993, standing alone, may not have been sufficient. . ."). Under these circumstances, the Court cannot conclude the exercise of personal jurisdiction over this defendant would be fair, reasonable or comport with due process. See Chaiken, 119 F.3d at 1029.

Apparently recognizing the weakness in premising jurisdiction on Flotec's general contacts with this state, the plaintiff states: "In fact, Hyperkinetics seeks to exercise personal jurisdiction over Flotec for causes of action that arise out of or are related to specific Flotec advertising, marketing, and promotional contacts with the State of

Vermont.” Paper 38 at 3. Plaintiff bases this argument on the fact that Flotec has hosted a web site which promotes its products. See Plaintiff’s Response to Reply Brief (Paper 43) at 2 (“[T]he offending technical bulletin was published by Flotec on its Web site; that the Flotec Web site was available to and intended to be viewed by prospective Flotec customers everywhere . . .”); According to plaintiff, this shows “activity was purposefully directed at the Vermont market.” See Paper 38 at 11.

As one court explained:

The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. . . . At the opposite end are situations where a defendant has simply posted information on the Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host

computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

Zippos Mfg. Co. v. Zippos Dot Com, Inc., 952 F. Supp. 1119, 1123-24 (W.D. Pa. 1997) (footnote and citations omitted).

According to Flotec, its "web site is a passive web site that merely makes information about its products and how to purchase them available to the general public. Flotec does not use its web site to enter into contracts with businesses or individuals in Vermont." Defendant's Response (Paper 41) at 7. The plaintiff has failed to offer facts which materially contradict this characterization. "Creating a site, like placing a product into the stream of commerce, may be felt nationwide - or even worldwide - but, without more, it is not an act purposefully directed toward the forum state." Bensusan Rest. Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996), aff'd, 126 F.3d 25 (2d Cir. 1997).

The Motion For Summary Judgment is GRANTED. The complaint is dismissed for lack of personal jurisdiction over the defendant.

SO ORDERED.

Dated at Brattleboro, Vermont, this \_\_\_\_ day of September, 2003.

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J. Garvan Murtha  
United States District Judge